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Nos. 81-2147 and 81-2188

In the Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF ARIZONA, ET AL., PETITIONERS

v.

SAN CARLOS APACHE TRIBE OF ARIZONA, ET AL.

STATE OF MONTANA, ET AL., PETITIONERS

v.

NORTHERN CHEYENNE TRIBE OF THE NORTHERN CHEYENNE INDIAN RESERVATION, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION OF THE UNITED STATES FOR LEAVE TO FILE A POST-ARGUMENT MEMORANDUM AND POST-ARGUMENT MEMORANDUM

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Pursuant to Rule 35.6 of the Rules of this Court, the Solicitor General, on behalf of the United States, moves for leave to file the annexed post-argument memorandum.

After elaborate briefing, these consolidated cases were orally argued on March 23, 1983. Because the cases combined more than a dozen separate actions, many with differing factual settings and procedural histories, and involving a large number of respond-

ents presenting disparate arguments, the submissions to the Court, both in briefs and oral arguments, were unusually numerous and varied, perhaps contributing more color than clarity. At all events, the arguments of the United States appear to have left unanswered questions.

Specifically, two concerns voiced from the Bench during the oral argument were not treated in the briefs and were inadequately dealt with at the argument. These are:

(a) Whether (other objections aside) federal court adjudication of Indian water rights alone is in practical, particularly because of the prospect of conflicting determinations of some or all of the underlying or ultimate issues by the State court.

(b) Whether (assuming concurrent jurisdiction) there is any rational basis for insisting on federal court adjudication of Indian reserved water rights while submitting other reserved water rights held by the United States to State court adjudication.

No doubt, these obviously relevant questions should have been anticipated. Nevertheless, the Court may deem it helpful to consider the fuller responses now tendered. In the special circumstances of these complex cases, of substantial importance for most water users in the West, Indian and non-Indian, it seems appropriate to provide a short memorandum limited to those two points.

Respectfully submitted.

REX E. LEE
Solicitor General

MARCH 1983

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POST-ARGUMENT MEMORANDUM FOR THE UNITED STATES

The present memorandum is addressed only to the following two questions:

(a) Whether (other objections aside) federal court adjudication of Indian water rights alone is in practical, particularly because of the prospect of conflicting determinations of some or all of the underlying or ultimate issues by the State court.

(b) Whether (assuming concurrent jurisdiction) there is any rational basis for insisting on federal court adjudication of Indian reserved water rights while submitting other reserved water rights held by the United States to State court adjudication.

A. THE LIMITED AND CONDITIONAL CHARACTER OF A FEDERAL COURT DECREE ADJUDICATING INDIAN WATER RIGHTS PRECLUDES ANY SUBSTANTIAL RISK OF RELITIGATION OR CONFLICTING DETERMINATIONS BY THE STATE COURTS

In determining whether Congress intended to permit or direct adjudication of Indian reserved rights in federal court and other water rights in State court, it is obviously relevant to know whether such a regime of divided authority can work. We have submitted that the policy of the McCarran Amendment (43 U.S.C. 666) requires roughly contemporaneous (but not necessarily simultaneous) proceedings in the two court systems and the joinder (whether directly or indirectly) of all competing water users on a stream, so that each decree will bind all interested parties. See U.S. Br. 27-29. And we have attempted to show that the alleged burdens of such "piecemealing" are minimal. U.S. Br. 30-35. But questions from the Bench suggest that we have not adequately explained why our submission entails no duplication and no potential for conflicting decrees.

1. We first stress that the quantification of water rights appertaining to an Indian Reservation is a wholly separate and independent task—whatever court performs it. Since the principle is that Congress (or the Executive acting pursuant to congressional authorization) "reserved" all necessary water when establishing the Reservation, the only question is how much water is reasonably needed to satisfy the purposes for which the Reservation was set aside. Whatever the standard (whether that followed in *Arizona* v. *California*, 373 U.S. 546, 600-601 (1963), or some other), that question of federal law can be answered without determining how much water is available or what other claims there may be on the same water source. That is because, as this Court squarely held in *Arizona* v. *California*, *supra*, 373 U.S. at 597, and *Cappaert* v. *United States*, 426 U.S. 128, 138-139 (1976), the reserved water doctrine involves no equitable apportionment. Subject only to prior rights and the bounty of nature, the United States appropriated whatever quantity of water is needed for the Reservation.

This would be true in any State. But, in Western States following the law of first appropriation, it is consistent with the traditional rule that water rights are independent, not a matter of equitable division. The major difference between federal reserved rights and state law appropriative rights is that, in the first case, the appropriation is accomplished by law, in the other, by actual beneficial use.[1] Of course, in order to *administer* the competing rights in times of scarcity,

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[1] These cases afford no occasion to delimit the scope and special characteristics of the federal reserved water doctrine. Whatever they are, these are controlling rules of federal law, applicable whether the quantification is accomplished in a federal or State court.

it is important to prepare a complete schedule of water rights, arranged by priority date, and to estimate the available volume so that junior appropriators are not permitted to prejudice any seniors downstream. That is why we concede the eventual need for a comprehensive decree and unitary administration. But this is not, in our submission, the task of the federal court, which need only quantify and date the Indian entitlement.

2. This brings us to the second point. Of course, in establishing a federal Reservation (for Indian purposes or any other), the United States did not (and, short of condemnation, presumably could not) divest existing rights to water from the same source. And, needless to say, although man-made interventions may prevent waste, regularize flow and permit storage, Congress could not appropriate more water than nature provides. Accordingly, any decree quantifying the entitlement of an Indian Reservation is doubly conditioned: it is subject to prior rights and it is limited by the physical availability of then unappropriated water.

But it does not follow that a federal court adjudicating Indian water rights should attempt to determine what prior rights may exist or whether the remaining flow can satisfy the full needs of the Reservation. The federal decree need only recite that the Reservation is entitled to a specified quantity of water to the extent that such quantity is available after first satisfying any prior rights as determined by the State court. In States like Arizona and Montana, following the "Simon-pure appropriation law, the 'Colorado Doctrine'" (F. Trelease, *Water Law* 11 (3d ed. 1979)), this is accomplished by simply assigning a

priority date to the Reservation entitlement[2]—normally the date it was established.[3]

A sufficient example of the kind of decree we envisage is that entered by this Court in *Arizona v. California*, 376 U.S. 340 (1964), so far as it quantified the entitlement of the five Indian Reservations of the Lower Colorado. Art. II(D)(1)-(5), 376 U.S. at 343-345. At the time, it was undetermined whether there existed prior rights and, accordingly, these allocations were made contingent upon first satisfying any such earlier "perfected rights" as might later be adjudicated. Art. II(B)(3), 376 U.S. at 342-343; see also Art. VI, 376 U.S. at 351-352. While in that case, the later determination of early non-Indian rights was made by the Court itself (albeit by agreement), *Arizona* v. *California*, 439 U.S. 419 (1979), here we would concede that task to the State courts.

3. The upshot is that there is no duplication between the roles of the State and federal courts in our submission. Nor is there any prospect of conflicting decisions. Once it is settled that quantification of Indian water rights should be accomplished by the federal court, provided only that jurisdiction is timely invoked, there is no reason to anticipate that the State court would embark on the same task and seek to

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[2] In States which do not strictly follow the principle of "first in time, first in right," the federal decree presumably should make clear that only prior rights can impinge on the water reserved as of a given date for Indian purposes. But, in Arizona and Montana the fixing of a priority date (or dates) implements that rule.

[3] It is a complicating factor, but no obstacle, if the Reservation was established in several stages. This Court's decree in *Arizona* v. *California*, 376 U.S. 340, 344-345 (1964), quantifying the entitlement of the Colorado River Indian Reservation, illustrates how such a situation is dealt with. See also the Supplemental Decree in the same case, 439 U.S. 419, 423, 428 (1979).

enter judgment first. Indeed, considerations of comity aside, it would not be surprising if the elected State judges were grateful to be relieved of the unfamiliar and unpopular duty of assigning water to Indians at the expense of other claimants. And, of course, after the federal decree is entered, all competing water users, having been parties or represented by parties (whether or not active participants) to the adjudication of the Indian Reservation rights in the federal forum, will be precluded from attempting to relitigate that issue in the State proceedings.

On the other hand, under our submission, the federal court will have no occasion to "poach" on the traditional domain of the State court system. In the past, federal courts commonly adjudicated water rights neither derived from federal law nor belonging to the United States, presumably deeming it necessary to exercise such pendent jurisdiction in the absence of an activated comprehensive State adjudicatory system. But, today, in most, if not all, Western States (including Arizona and Montana) that intrusion is now avoidable if, as we have argued, it is *not* imperative for a single court to perform the entire task, provided complimentary proceedings are initiated and, ultimately, a comprehensive decree is entered by the State court to be administered by the appropriate State authorities.

To be sure, the federal court will retain power to assure that its decree is not frustrated. But there is no reason to anticipate any such problem. There are already many federal water decrees in the West which must be integrated into comprehensive State adjudications. One example is the so-called "Globe Equity" decree entered half a century ago by the United States District Court for the District of Arizona governing a portion of the Gila River. *United States* v. *Gila Valley Irrigation District*, No. E-59-Globe (June 29,

1935).[4] The Arizona Water Code expressly provides that such determinations must be respected (see Ariz. Rev. Stat. Ann. § 45-257(B)(1) (Cum. Supp. 1982); I J.A. 116, 126-127) and we have no basis for doubting that the Montana courts will act in like manner.

B. PERMITTING STATE COURT DETERMINATION OF NON-INDIAN FEDERAL RESERVED RIGHTS IS NOT INCONSISTENT WITH FEDERAL COURT ADJUDICATION OF INDIAN WATER RIGHTS

The question arose why, under our submission, *all* federal reserved rights, whether appertaining to Indian Reservations or other federal establishments, ought not be subject to the same jurisdictional scheme—as *Colorado River Water Conservation District* v. *United States* (*Akin*), 424 U.S. 800 (1976), suggests. In other words, how can we concede the appropriationess of State jurisdiction in these cases for non-Indian federal reserved rights while, at the same time, insisting that the federal court should adjudicate the Indian water claims? There are two answers.

1. Although, in light of *Akin*, we reject the proposition that State courts wholly lack jurisdiction to determine Indian water rights, we have sought to show that there is a consistent and persisting Congressional tradition of exempting Indian property from State jurisdiction which counsels reading the McCarran Amendment with special caution insofar as it would needlessly reverse that tradition when the goals of the Amendment can be fully satisfied without doing so. See U.S. Br. 15-23. Beyond the pattern of treaty stipulations and the unique jurisdictional Indian disclaimer clauses of Enabling Acts, we have stressed the contemporaneous provisions of Public

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[4] This Court took note of that decree in Article IV(D) of its decree in *Arizona* v. *California*, *supra*, 376 U.S. at 348-350.

Law 280 (Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 *et seq.*) (25 U.S.C. 1322(b) and 28 U.S.C. 1360(b)) expressly withholding Indian water rights from the cession of federal jurisdiction to the State courts in 1953 and, especially, the deliberate Congressional decision in 1966, through the enactment of 28 U.S.C. 1362, to widen access to the federal courts for tribal assertion of federal law rights. See U.S. Br. 23-27. To be sure, there is something of the same tradition for other property rights held by the United States. But it is not as unbroken and, in any event, we find here no legislation since the McCarran Amendment's explicit subjection of federal water rights to State adjudication comparable to the provisos in Public Law 280 or Section 1362.

Thus, in our view, there are strong indications of a Congressional policy more solicitously insulating Indian water rights which would justify a federal court in retaining jurisdiction to adjudicate Indian reserved rights while relinquishing to the State courts the determination of other federal water rights, even reserved rights. While we believe this different standard is required even when the United States alone is invoking federal jurisdiction to quantify Indian water rights (see U.S. Br. 23, 26-27), there is an obvious case for so doing when the Tribe itself has taken up Congress' invitation to invoke the federal forum, as is true in all the Arizona cases before the Court and in most of the Montana cases by virtue of tribal intervention. This is, we stress, a situation distinguished in *Akin* and left unresolved. 424 U.S. at 820 n.26.

2. This is not to say that circumstances will never require a federal court to retain jurisdiction to adjudicate all water rights held by the United States, whether for Indian Reservations or other purposes, and, indeed, if necessary, all competing non-federal

claims on the same stream system. *Akin* teaches that this is the duty of the federal court if no comprehensive State proceedings are initiated promptly after federal jurisdiction is invoked. Accordingly, we believe the federal district court in the Montana cases now before this Court should have proceeded on the complaints as filed. And, if, as *Akin* suggests, all competing water rights must always be adjudicated in the same forum, that should be the result even now.[5]

On the other hand, if our submission is correct that the McCarran Amendment does not prohibit separate adjudication of distinct classes of water rights in contemporaneous complementary proceedings, provided a comprehensive decree binding on all results, we believe the federal court need go no further than those invoking its jurisdiction request. Even if no State proceedings are available to complete the task, the federal court is presumably free to adjudicate those rights submitted to it. *E.g.*, *Cappaert* v. *United States*, *supra*. All the more, when a general stream adjudication has been initiated in the State courts, the federal district court should acquiesce in limiting its role to the prayer of the plaintiff, even if it could properly exercise wider jurisdiction.

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[5] It is, of course, no more justifiable for a federal court to decline to exercise its jurisdiction by staying the action, formally or informally, rather than dismissing it. See 81-2188 Pet. App. 41. Accordingly, applying the "considerations of wise judicial administration" identified in *Akin*, we believe the court of appeals correctly reversed the district court's action staying and ultimately dismissing the Montana cases. See *id.* at 38-45, 46.

In the Arizona cases, if our "bright-line" submission is rejected and the *Akin* analysis is to be followed, the appropriate course, we believe, is to remand those cases to the court of appeals to review (as it has not, see 81-2147 Pet. App. A-10, B-4) the district court's dismissal of the actions on the ground of "wise judicial administration" (*id.* at E-1 to E-15).

Thus, here, although the United States initially asked the United States District Court in Montana to adjudicate all federal water rights, we see no bar to the court's restricting its task to determining the claims advanced on behalf of Indian Reservations now that appropriate State proceedings have been initiated and the United States is content to submit its other claims in that forum. After all, no one is required to invoke the federal court if the State court enjoys concurrent jurisdiction. As a matter of policy, the United States has determined not to assert any prerogative it may enjoy to insist on federal court adjudication of its non-Indian water rights and, at least in the absence of objection from any party, that decision poses no problem.

It is no obstacle that the Government takes a different stance in respect to Indian water rights. Even if it were free to ignore the preference of the Tribes in favor of a federal court determination of their rights, the United States cannot be faulted for supporting their choice if the jurisdictional rules permit it. What is more, so far as the Tribes have independently invoked federal jurisdiction under 28 U.S.C. 1362, whether as original plaintiffs in the Arizona cases or as plaintiffs or intervenors in the Montana cases, it is not for the United States to waive their right to a federal forum.

For the reasons stated here and in the Brief for the United States, the judgments of the court of appeals should be affirmed with the modifications indicated in that brief.

Respectfully submitted.

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